

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

JOVITO ESCALANTE
Claimant

VS.

IBP, INC.
Self-Insured Respondent

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Docket No. 247,782

ORDER

Respondent requested review of the November 5, 2004 Post Award Order for Medical Treatment entered by Administrative Law Judge Brad E. Avery. This is a post-award proceeding for medical benefits. Both parties submitted briefs and the case was placed on the summary docket on December 10, 2004, for a decision without oral argument.

APPEARANCES

Conn Felix Sanchez of Kansas City, Kansas, appeared for the claimant. Gregory D. Worth of Roeland Park, Kansas, appeared for the self-insured respondent.

RECORD AND STIPULATIONS

The Board has considered the record and adopted the stipulations listed in the Award.

ISSUES

The parties resolved this claim by an agreed award on February 1, 2002, but the claimant reserved the right to seek future medical treatment. The claimant filed an Application for Post Award Medical on November 4, 2003, requesting treatment for his upper extremities as recommended by Dr. Pedro A. Murati.

The Administrative Law Judge (ALJ) found claimant's need for medical treatment was related to his injuries suffered working for respondent and ordered medical treatment with Dr. Murati.

The respondent notes that the court ordered independent medical examiner determined claimant was at maximum medical improvement and did not need additional medical treatment. Consequently, respondent argues claimant has failed to meet his burden of proof regarding the need for additional medical treatment. In the alternative, respondent argues that if claimant is in need of medical treatment it is the result of intervening injuries claimant suffered working for subsequent employers.

Claimant argues that when released from treatment his upper extremities were still symptomatic as noted by Drs. Roger W. Hood and Sergio Delgado. Dr. Murati concluded claimant's current condition and need for medical treatment was caused by the injuries claimant suffered working for respondent. Claimant further argues there is no medical evidence to support respondent's contention that his subsequent work activities aggravated, accelerated or intensified his conditions. Moreover, claimant argues his subsequent work activities were easier than his work duties for respondent. Accordingly, claimant requests the Board to affirm the ALJ's Post Award Order for Medical Treatment.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the evidentiary record filed herein, the stipulations of the parties, and having considered the parties' briefs and oral arguments, the Board makes the following findings of fact and conclusions of law:

The claimant was employed as a chuck boner at respondent's plant and suffered repetitive trauma injuries to his bilateral upper extremities. The claimant last worked for respondent on July 6, 1999. Claimant was provided medical treatment which ultimately included surgery consisting of a right acromioplasty and distal clavicle resection. Claimant later had additional surgery consisting of a right carpal tunnel release. Dr. Roger W. Hood, the treating physician, released claimant at maximum medical improvement on April 5, 2001. Claimant understood he was released with a 50 pound lifting restriction and that he was not to do a lot of repetitive work with his upper extremities.¹

Claimant returned to work with Future Beef, a meat packing plant, where he worked from October 1, 2001, through August 2002 when that company closed. Claimant's job duties consisted of trimming fat from the top of rib eyes. Claimant held a hook in his left hand and a knife in his right hand to perform this task. Claimant would handle approximately 70 pieces of meat an hour.

¹ Escalante Depo. at 34; P.A.H.Trans. at 7-8.

After claimant returned to work with his new employer he settled his workers compensation claim with respondent. The Stipulation for Agreed Award was entered on February 1, 2002, and resolved the claim for a compromise 18 percent whole person functional impairment. The agreed award provided claimant retained the right to future medical treatment at the expense of respondent either by agreement of the parties or upon application to the Director of the Division of Workers Compensation.

As previously noted, the claimant's employment with Future Beef ended in August 2002 when that plant closed. Claimant returned to work in May 2003 when the meat packing plant reopened as Creekstone Farms. Claimant's job was trimming fat from the meat which again required the use of a knife and hook to trim fat from the beef. The pieces of meat were on a conveyor belt and were pulled off with a hook, trimmed and placed in a bag. Claimant then was placed in a position deboning the brisket. This task again required the use of a hook and knife. As the meat came by on a conveyor, the claimant would use the hook to pull the meat off the belt and use the knife to separate the meat and bone.

As previously noted, claimant last saw Dr. Delgado in May 2001 and Dr. Hood in April 2001. Claimant never sought medical treatment for his upper extremities until he went to Dr. Murati on August 18, 2003. The claimant told Dr. Murati that he had been working at Creekstone Farms for three months as a brisket boner and that the job is lighter than his former job duties for respondent.

Dr. Murati noted claimant's medical history, performed an examination and concluded claimant suffered from bilateral ulnar cubital syndrome, left carpal tunnel syndrome, status post right carpal tunnel release, status post right shoulder acromioplasty and a left shoulder rotator cuff tear or strain. The doctor recommended additional treatment for the various conditions.

Dr. Murati concluded that the diagnosed conditions were the result of claimant's injuries suffered working for respondent. The doctor imposed restrictions for the upper extremities of no ladders, no crawling, no heavy grasp or repetitive grasp with both hands, no above shoulder level work, and no work more than 24 inches from the body. The doctor noted claimant needed a wrist splint while working and at home, no use of hooks or knives, no use of vibratory tools, occasional lift, push pull to 20 pounds and frequent to 10 pounds, and occasional repetitive hand controls.

On cross-examination, Dr. Murati agreed he did not have any knowledge of claimant's job duties other than the history noted in his report. Nor did the doctor discuss in detail claimant's job duties as a brisket boner with Creekstone Farms. The doctor agreed that repetitive gripping, grasping, forceful use of hand controls, forceful use of knives or use of hooks are the type of activities which aggravate, accelerate or worsen upper extremity conditions, cubital tunnel, carpal tunnel, and shoulder pain. Moreover, the doctor agreed claimant's repetitive use of hook and knife at Creekstone Farms would

violate his restrictions. Lastly, the doctor agreed he could not recall another instance where he had ever issued an opinion that repetitive work activities such as claimant engaged in at Creekstone Farms did not aggravate, accelerate or worsen an employee's condition.

After claimant was examined by Dr. Murati, he filed an Application for Post Award Medical on November 4, 2003. The ALJ issued an Order Referring Claimant for Independent Medical Evaluation on December 22, 2003. The order designated that Dr. Peter Bieri would examine claimant "for evaluation and disability rating regarding an alleged work-related injury sustained by claimant allegedly with this respondent, and recommendations regarding what future medical treatment is appropriate, if any."

Dr. Bieri examined claimant and issued a report on March 3, 2004. Upon examination, the claimant told the doctor that surgery had provided little or no improvement to his right upper extremity and that he experienced continued pain in the right shoulder, hand and wrist made worse with repetitive activity. The claimant had similar but less symptomatology on the left. The doctor noted claimant had marginal results post-surgery.

Dr. Bieri concluded claimant was at maximum medical improvement and his impairments were stabilized and permanent. The doctor noted claimant was not under active medical care for his upper extremity injuries, nor was any future specific treatment anticipated. The doctor rated claimant's upper extremity injuries which combined for a 19 percent whole person functional impairment.

At the time of the post award hearing, the claimant continued to work for Creekstone Farms. As previously noted, claimant had not sought medical treatment for his upper extremities after he was released by Dr. Hood on April 5, 2001, until he went to Dr. Murati on August 18, 2003, which was after he had returned to work at Creekstone Farms for about three months.

Claimant agreed his work at Creekstone Farms meat packing plant required that he use a hook and knife all the time during his workday. Claimant testified he is having problems with his shoulders and arms and that he had those problems when he left work with respondent. Claimant was equivocal whether his condition in his upper extremities had worsened since treatment with Dr. Hood. The claimant testified:

Q. Let me ask this again. Are the problems you're having in your arms and shoulders now the same, better or worse than they were when you saw Dr. Hood?

A. "They're worse."

Q. When did they get worse?

A. "That's how they've always been."

Q. When you say they're worse, when did they get worse?

A. "When I had surgery the pain went away a little, but in this arm that they didn't give me any treatment has always hurt."²

The claimant was released from Dr. Hood's care on April 5, 2001. Claimant returned to work in a packing plant on October 1, 2001. Claimant's attorney referred him for an evaluation with Dr. Murati on August 18, 2003. At that time the claimant had been back working in the two packing plants for a total of a year and a few months. Claimant's latest return to work in the packing plant began in May 2003. Claimant agreed that Dr. Murati was the first doctor he went to after being released from treatment with Dr. Hood.³ And the claimant agreed he did not go see a doctor and complain about his arms until after he had been back working in the packing plants for a combined total of over a year.

K.S.A. 44-510k provides that further medical care for a work-related injury can be ordered based upon a finding such care is necessary to cure or relieve the effects of the injury which was the subject of the underlying award.

When the primary injury under the Workers Compensation Act is shown to arise out of and in the course of employment, every natural consequence that flows from the injury including a new and distinct injury, is compensable if it is a direct and natural result of the primary injury.⁴ It is not compensable, however, where the worsening or new injury would have occurred even absent the primary injury or where it is shown to have been produced by an independent intervening cause.⁵ Under those circumstances the current injury would constitute a new accidental injury and would not be compensable as a direct and natural consequence of the original injury.

The claimant testified that after surgery his right upper extremity was somewhat improved but his left upper extremity remained the same. When claimant was released from treatment, Dr. Hood noted claimant continued to have essentially the same complaints as before treatment and his surgeries. Dr. Delgado also noted claimant continued to have bilateral complaints in his shoulders, wrists and hands. Dr. Murati concluded claimant's current conditions were caused by and a natural consequence of his work-related accidents while employed by respondent.

² Escalante Depo. at 32.

³ P.A.H. Trans. at 11.

⁴ *Jackson v. Stevens Well Service*, 208 Kan. 637, 493 P.2d 264 (1972).

⁵ *Nance v. Harvey County*, 263 Kan. 542, 952 P.2d 411 (1997). See also *Bradford v. Boeing Military Airplanes*, 22 Kan. App. 2d 868, 924 P.2d 1263, rev. denied 261 Kan. 1084 (1996).

Conversely, Dr. Bieri, the court ordered independent medical examiner, concluded claimant was at maximum medical improvement and noted the claimant was not under active medical treatment nor was future medical treatment anticipated. The medical records introduced at the hearing before the ALJ do not contain any other indication that claimant's employment at the packing plants aggravated, accelerated or intensified his condition.

After the claimant was released from treatment by Dr. Hood on April 5, 2001, he did not seek treatment for his upper extremities until his attorney sent him to Dr. Murati on August 18, 2003. Although claimant alleged his upper extremity condition remained the same he did not seek medical treatment for approximately two and a half years. Claimant returned to work performing repetitive upper extremity activities even though the claimant was aware that Dr. Hood had advised against repetitive upper extremity activities. Moreover, Dr. Bieri noted claimant said that his bilateral upper extremity symptoms were made worse with repetitive activities. And Dr. Murati agreed such activities typically result in aggravation, intensification and worsening of a condition.

The claimant testified the condition of his upper extremities remained the same after he left work with respondent but he also indicated that his condition worsened with repetitive use which is the activity he engaged in while working on two different occasions for meat packing plants after leaving work with respondent. Claimant agreed he did not seek medical attention for his upper extremities for approximately two and one half years after he left work with respondent. Dr. Bieri, the court ordered independent medical examiner determined claimant had received appropriate medical treatment, had reached maximum medical improvement and no further treatment was anticipated. The Board concludes claimant has failed to meet his burden of proof to establish that he requires additional medical treatment for the injuries suffered working for respondent.

As previously noted, the Board is not unmindful that Dr. Murati concluded claimant required additional treatment and that such treatment was for medical conditions caused by claimant's injuries suffered working for respondent. But the history of claimant's subsequent work activities given by claimant to Dr. Murati did not accurately reflect the repetitive nature of claimant's work. And Dr. Murati agreed repetitive work including use of hook and knife would violate claimant's restrictions. Finally, Dr. Murati agreed that, apparently until this case, he could not recall ever issuing an opinion that repetitive activities such as claimant engaged in at Future Beef and Creekstone Farms did not aggravate, accelerate or worsen an employee's condition. Consequently, the Board does not find persuasive the doctor's opinion that claimant's condition was caused by his injuries suffered working for respondent.

AWARD

WHEREFORE, it is the finding of the Board that the Post Award Order for Medical Treatment of Administrative Law Judge Brad E. Avery dated November 5, 2004, is

reversed to reflect claimant has failed to meet his burden of proof that he requires additional medical treatment for the injuries suffered working for respondent. Claimant's request for additional medical treatment is denied.

IT IS SO ORDERED.

Dated this _____ day of January 2005.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: Conn Felix Sanchez, Attorney for Claimant
Gregory D. Worth, Attorney for Respondent
Brad E. Avery, Administrative Law Judge
Paula S. Greathouse, Workers Compensation Director